U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 June 2003

In the Matter of:	:	
	:	
BILLY OWENS,	:	
Claimant,	:	
	:	Case No: 2001-BLA-1156
v.	:	
	:	
BALD EAGLE COAL CORPORATION,	:	
Employer,	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-In-Interest	:	
	:	

Appearances:

Joseph E. Wolfe, Esquire
For the Claimant

H. Ashby Dickerson, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER – GRANTING BENEFITS

Statement of the Case

This proceeding involves a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the Act), and the regulations promulgated thereunder.[1] Since Claimant filed

[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits are denoted "D-"; Claimant's exhibits, "C-"; Employer's exhibits, "E-"; and citations to the transcript of the hearing, "Tr."

this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the Fourth Circuit of the United States since Claimant was last employed in the coal industry in Virginia. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

Claimant, Billy Owens, filed his first claim for benefits under the Act on May 19, 1989 (D-32-1). The claim was denied by the District Director on November 1,1989, because Claimant was working in coal mine employment, and was not totally disabled (D-36-15). On December 1, 1989, Claimant requested a formal hearing, and the claim was referred to the Office of Administrative Law Judges on February 21, 1990 (D-32-16, -21). On March 9, 1990, Claimant filed a motion to remand the case, along with supplemental evidence, and on July 23, 1990, Administrative Law Judge G. Marvin Bober remanded the case to the District Director (D-32-22, -23). On September 17, 1990, the District Director issued a Notice of Initial Finding of Entitlement (D-32-27). Employer filed a controversion on October 24, 1990 (D-32-28). The District Director affirmed its initial finding of entitlement on January 18, 1991 (D-32-34). By letter dated February 4, 1991, Employer contested the District Director's findings, and the claim was referred to the Office of Administrative Law Judges on March 29, 1991 (D-32-36, -42).

A hearing was held before Administrative Law Judge Robert D. Kaplan on October 31, 1991, in Abingdon, Virginia (D-32-53). On July 7, 1992, Judge Kaplan issued a Decision and Order Denying Benefits. Judge Kaplan gave Claimant "the benefit of the reasonable doubt" and found that Claimant established the presence of pneumoconiosis by the x-ray evidence as a whole. He also found that the medical evidence failed to rebut the presumption under §718.203 that Claimant's pneumoconiosis arose at least in part out of his coal mine employment. However, Judge Kaplan found that the medical evidence failed to establish that Claimant was totally disabled due to a respiratory or pulmonary condition, and, accordingly, he denied the claim. (D-32-59). Claimant appealed on July 29, 1992, and by unpublished Decision and Order dated February 23, 1994, the Benefits Review Board affirmed Judge Kaplan's findings regarding the length of coal mine employment and that Claimant established the presence of pneumoconiosis arising out of coal mine employment, reversed his determination that Claimant failed to establish that he is totally disabled, and remanded the claim with instructions (D-32-60, -64). In a February 6, 1995, Decision and Order Upon Remand by the Benefits Review Board, Judge Kaplan denied the claim based on his finding that the Claimant failed to establish total disability due to a respiratory or pulmonary condition based on the physicians' opinions or the medical evidence as a whole (D-32-68). On February 22, 1995, Claimant filed a Notice of Appeal, followed by a motion to remand and a request for modification (D-32-69, -73, -74).

The claim was remanded to the District Director on May 30, 1995, who denied the request for modification on September 26, 1995 (D-32-75, -82). On October 6, 1995, Claimant requested a formal hearing with the Office of Administrative Law Judges (D-32-83). After several procedural actions, the parties waived an oral hearing, and on February 5, 1997, Judge Kaplan issued, on the record, a Decision and Order Denying Benefits (D-32-93, -94, -95, -96, -97, -99, -104). Judge Kaplan reconsidered the previously submitted chest x-rays, biopsy, and medical opinions regarding the presence of pneumoconiosis in accordance with *Director, OWCP v. Greenwich Collieries*, 512

U.S. 267 (1994), *aff'g. sub. nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), which overruled the Department of Labor's reliance on the "true-doubt rule" in cases decided under the Administrative Procedure Act (APA) §7(c).[2] Upon reconsideration of the evidence, Judge Kaplan found that Claimant had established the presence of pneumoconiosis as of July 7, 1992, by well-reasoned medical opinions under §718.202(a)(4), and that Claimant's pneumoconiosis arose out of his coal mine employment. Judge Kaplan found no mistake in a determination of fact in his prior decision and order issued July 7, 1992. Judge Kaplan also found that Claimant had not established a change in conditions since the evidence did not demonstrate that Claimant was totally disabled by a respiratory or pulmonary impairment (D-32-104). Claimant appealed and the Benefits Review Board affirmed the denial of his request for modification by unpublished Decision and Order dated February 24, 1998 (D-32-105, -112).

Claimant filed his second request for modification with supporting evidence on September 4, 1998, which was denied by the District Director on October 26, 1998 (D-32-113, -116). Claimant filed a third request for modification by submitting new evidence on September 28, 1999 (D-32-117, -118). The District Director denied the request on November 18, 1999 (D-32-121). Claimant took no further action in connection with his initial claim, and so it has become final, and it has been administratively closed (D-35).

Claimant filed his first subsequent or duplicate claim for benefits on January 3, 2001 (D-1). The Department of Labor initially found that Claimant was entitled to benefits and issued a Notice of Initial Finding on March 8, 2001 (D-21). The District Director affirmed the initial finding by letter dated April 23, 2001 (D-22). Employer, Bald Eagle Coal Corporation, filed a controversion on May 22, 2001 (D-24). The District Director re-affirmed its initial finding of entitlement on July 19, 2001, and Employer requested a formal hearing on August 15, 2001 (D-31, 33). The claim was forwarded to the Office of Administrative Law Judges, and a hearing took place before this tribunal on July 17, 2002, in Abingdon, Virginia.

ISSUES[3]

1. Whether, under §725.309, Claimant has shown a material change in conditions since the previous denial of benefits on November 18, 1999, by establishing that he is totally disabled by a respiratory or pulmonary impairment?

2. If so, whether Claimant has established the elements of entitlement to benefits under Part 718?

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[2] In his February 5, 1997, Decision and Order Denying Benefits, Judge Kaplan acknowledged that he had relied on the "true-doubt rule" in his July 7, 1992, Decision and Order in finding that Claimant established the presence of pneumoconiosis.

[3] Although Employer contested all applicable issues in this claim, and stipulated to timeliness, Claimant's identity as a miner, Claimant's length of and post 1969 employment, and dependency at the hearing, this tribunal limits consideration to those issues which are in substantial dispute and those which were argued by Employer in Employer's Closing Argument.

FINDINGS OF FACT AND CONCLUSION OF LAW

Background

The Claimant, Billy Owens, was born July 15, 1940, and completed seven years of formal education (D-1). Claimant's wife passed away on January 26, 2002, and he has no dependents for purposes of augmentation under the Act (Tr. 23). Claimant alleges that he completed thirty-three years of coal mine employment, ending in 1990 (D-1, 2). Employer stipulated to twenty-four years, nine months, and twenty days of coal mine employment, as found by the Department of Labor (D-34; Tr. 12). This tribunal reviewed the record and finds that the Department of Labor correctly determined that Claimant completed twenty-four years, nine months, and twenty days of coal mine employment (D-2, 4-6, 35; Tr. 12, 17-20). Claimant last worked in the coal mining industry for Employer as a roof bolter (Tr. 20).

Medical Evidence Developed Subsequent to the Closing of the Record on Which the Prior Denial was Based[4]

X-rays[5]

Exhibit No.	X-ray Date	Physician	Qualifications	Film Quality	Interpretation
D-12, 13	1/19/01	Patel[6]	B/R	2	1/0, t/q
D-14	1/19/01	Navani	B/R	3	1/0, q/p
E-7	1/19/01	Fino	B	1	0/0
E-6	1/19/01	Wheeler	B/R	2	0/0

[4] The District Director's November 18, 1999, denial of the Claimant's third modification of Claimant's initial claim constitutes the previous denial for the purposes of this proceeding, as neither party appealed that denial and it became final (D-32-121, D-35).

[5] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; Board-certified radiologist, "R". An interpretation indicating "0/0" is used by this tribunal to signify that the x-ray was interpreted as negative for pneumoconiosis. In certain instances, where the doctor's credentials are not disclosed by the record, this tribunal has taken judicial notice of those qualifications by reference to the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org, and the List of NIOSH Approved B Readers, found, *inter alia*, at http://www.oalj.dol.gov/libbla.htm. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990).

[6] This tribunal has taken judicial notice of medical qualifications by reference to the worldwide web.

Exhibit No.	X-ray Date	Physician	Qualifications	Film Quality	Interpretation
E-5	1/19/01	Scott	B/R	2	0/0
D-29	6/7/01	Dahhan	B	1	0/0
E-1	6/7/01	Wheeler	B/R	2	0/0
E-2	6/7/01	Scott	B/R	2	0/0
C-1	12/26/01	Patel	B/R	2	1/1, t/q
E-9	12/26/01	Wheeler	B/R	2	0/0
E-10	12/26/01	Scott	B/R	2	0/0
E-11	12/26/01	Scataridge[7]	B/R	1	0/0

Pulmonary Function Studies[8]

Exh. No	Test Date	Age/ Ht	Doctor	Co-op./ Undst.	Conf.	FEV_1	FVC	MVV	Qualify
D-9	1/19/01	60/ 67"	Rasmussen	Good/ Good	Yes	1.75 1.84	2.65 2.64	64 79	Yes[9] No
D-29	6/7/01	60/ 169 cm	Dahhan	Poor/ Good	Yes	1.56 1.75	2.23 2.09	46 38	Yes Yes
C-1	12/26/01	61/ 67"	Rasmussen	Not Noted	No	1.77 1.72	2.51 2.39	52 65	Yes Yes

Arterial Blood Gas Studies [10]

[7] This tribunal has taken judicial notice of medical qualifications by reference to the worldwide web.

[8] Second set of entries on the same test relates to results after administration of bronchodilators.

[9] The results were deemed acceptable by Dr. John Michos, who is board-certified in internal medicine and the subspecialty of pulmonary disease.

[10] Second set of entries, if any, on the same test relates to results after administration of exercise.

Exh. No.	Test Date	Physician	Conform?	pCO_2	pO_2	Qualifying
D-26	2/16/00	Robinette	No[11]	40.5	68	No
D-11	1/19/01	Rasmussen	Yes	40 41	60 60	Yes Yes
D-29	6/7/01	Dahhan	Yes	44.9 44	68.4 74.6	No[12] No
C-1	12/26/01	Rasmussen	No[13]	39 34	67 64	No Yes

Medical Reports and Opinions

Dr. Donald L. Rasmussen

In connection with a medical report dated January 19, 2001, Dr. Rasmussen, who is board-certified in internal medicine, performed, *inter alia*, a pulmonary function study, an arterial blood gas study, and a physical examination of Claimant, and reviewed a chest x-ray. Dr. Rasmussen noted that Claimant was born in 1940 and did not smoke regularly. He also noted that Claimant worked in the coal mines for more than thirty-two years, and he last worked as a roof bolter, bending 130 bolts per day, which Dr. Rasmussen compared to lifting 100 pounds of coal and considered "heavy manual labor." Dr. Rasmussen noted that breath sounds in Claimant's lungs were minimally reduced, with "many, many fine inspiratory crackles" in the left lower lobe, but the right lobe was clear. Dr. Rasmussen opined that the ventilatory function studies revealed moderate, irreversible, obstructive insufficiency, moderate reduction of maximum breathing capacity, and minimal reduction of single breath carbon monoxide diffusing capacity, but the total lung capacity and residual volume and FRC were normal. In addition, he opined that there was minimal resting hypoxia, and with exercise, the oxygen transfer was moderately impaired and Claimant was minimally hypoxic. Dr. Rasmussen concluded that Claimant had occupational pneumoconiosis, or coal workers' pneumoconiosis (CWP), chronic obstructive pulmonary disease (COPD), emphysema, and "airflow obstruction and reduced SBDLCO," all of which was attributed to coal mine dust exposure. He opined that the studies indicated at least moderate loss of lung function, reflected by his ventilatory impairment and impairment in oxygen transfer during exercise, and that Claimant does not retain the pulmonary capacity to perform his last regular coal mine job with its attendant requirement for heavy manual labor. Dr. Rasmussen opined that Claimant had features in his x-ray which are consistent with asbestosis, and that there have been sources of asbestos in coal mines. (D-10).

In connection with a medical report dated December 26, 2001, Dr. Rasmussen performed a

[11] No altitude or barometric pressure recorded.

[12] The results of the pulmonary function study were viewed as not acceptable by Dr. Michos, which Dr. Dahhan stated in his report, because Claimant made less than an optimal effort.

[13] No altitude or barometric pressure recorded.

pulmonary function study, an arterial blood gas study, and an EKG, and reviewed an x-ray re-reading by Dr. Patel. He noted that Claimant's breath sounds were normal on the right, but "markedly" reduced on the left, with widespread medium rales, but no rhonci, or wheeze. He noted that Dr. Patel had found a 0.9 centimeter nodule in the left mid zone that was not present in the January 19, 2001 x-ray, but there was a question of granuloma or nipple shadow. The electrocardiogram revealed a left bundle branch block pattern. Dr. Rasmussen opined that the ventilatory function studies revealed moderate, irreversible restrictive and obstructive ventilatory impairment, that Claimant's maximum breathing capacity was markedly reduced, improving significantly after bronchodilator therapy, and the single breath carbon monoxide diffusing capacity was minimally reduced. Dr. Rasmussen also opined that the total lung capacity was minimally reduced, the residual volume of functional, residual capacity was normal, and there was moderate resting hypoxia. After Claimant underwent exercises, Dr. Rasmussen opined that Claimant's heart rate was normal, his volume of ventilation was normal, and there was no increase in VD/VT ratio, but the oxygen transfer was "at least moderately" impaired and he was minimally hypoxic. Dr. Rasmussen concluded that the studies indicated at least moderate loss of lung function, as reflected by the impaired ventilatory function and his impairment in oxygen transfer during exercises. He opined that this degree of impairment would render Claimant totally disabled for resuming his last regular coal mine job with its requirement for heavy manual labor. Dr. Rasmussen noted that Claimant has a significant history of exposure to coal mine dust, and his x-ray changes were consistent with pneumoconiosis. He stated that it was medically reasonable to concluded that Claimant has occupational pneumoconiosis, which arose from his coal mine employment. He opined that Claimant's pleural changes are suggestive of asbestos disease, but the only possible exposure to asbestos was during his work as an electrician when he "may well have had exposure to asbestos in old electrical boxes." Otherwise, Claimant had no history of exposure to asbestos. Dr. Rasmussen concluded that Claimant's coal mine dust exposure, and possibly exposure to asbestos in the coal mines, is the cause of his occupational pneumoconiosis, and is the only known risk factor for his disabling lung disease. (C-1).

Dr. A. Dahhan

In a medical report dated June 11, 2001, Dr. Dahhan, who is board-certified in internal medicine and the subspecialty of pulmonary disease, and is a certified B-reader, reviewed specified medical reports, and performed an arterial blood gas study, a pulmonary function study, an EKG, and a physical examination of Claimant before concluding that there was no evidence of pneumoconiosis. Dr. Dahhan noted that Claimant was a sixty year old nonsmoker who had worked in the coal mines for thirty-three years, his employment ending in 1990. Dr. Dahhan opined that there was insufficient medical evidence to justify a finding of pneumoconiosis, which he believed was supported by a review of a tissue sample from Claimant's lungs that did not reveal any evidence of CWP, but that Claimant did have idiopathic pulmonary fibrosis.[14] He also opined that Claimant had a mild respiratory impairment based on the various clinical and physiological parameters of his respiratory system and that Claimant does not retain the physiological capacity to perform heavy manual labor. Claimant had

[14] *Dorland's Illustrated Medical Dictionary, 25th ed.* defines idiopathic as self-originated or of unknown causation. *Dorland's Illustrated Medical Dictionary, 25th ed.*, W.B. Saunders Co. (1974).

an abnormal EKG, "i.e. left bundle branch block," which Dr. Dahhan opined could be a contributing factor to some of Claimant's respiratory impairment. Dr. Dahhan found no evidence of pulmonary impairment or disability in Claimant "caused by, contributed to, or aggravated by" the inhalation of coal dust or CWP, because his respiratory impairment was secondary to idiopathic pulmonary fibrosis and a cardiac condition with significantly abnormal EKG. Significantly, he found no cause for the pulmonary fibrosis and did not explain why he ruled out inhalation of coal dust. While it is clear that Dr. Dahhan did a review of the medical evidence before coming to his conclusions, the conclusions themselves are equivocal and confusing. (D-29).

In a deposition dated June 28, 2002, Dr. Dahhan discussed the findings of his examination and review of Claimant's medical history which he performed on June 7, 2002. During his examination of Claimant's chest and lungs, he observed that breath sounds were normal and there were no adventitious or abnormal sounds, and Claimant had a normal clinical examination of the chest. Dr. Dahhan noted that Claimant used the medication, Servent, a type of bronchodilator, and he opined that CWP generally does not respond to a bronchodilator. Dr. Dahhan opined that an arterial blood gas study indicated that Claimant had mild hypoxemia, and concluded that, because the values indicated improvement in the oxygenation upon exercise, the abnormality at rest was due to ventilation perfusion mismatch, not to a diffusion defect of alveolar hypoventilation. Dr. Dahhan stated that a ventilation perfusion mismatch indicates a reduction in the oxygen, and the matching would improve after exercise, because of better movement of air, and the hypoxemia would improve or subside. He opined that ventilation perfusion mismatching "is usually seen in individuals with airway problem[s]," more than in "individuals with parenchymal lung disease per se," and it is usually seen more with individuals with hyperactive airway disease, i.e., asthma and/or chronic bronchitis or emphysema, than in individuals with occupational lung disease. Dr. Dahhan opined that a history of shortness of breath is not inconsistent with improvement in oxygenation after exercise.

Dr. Dahhan also performed a pulmonary function study, but he opined that the lung volume study was invalid, because Claimant did not put forth enough effort when performing the test. A review of an x-ray taken during the examination of Claimant did not reveal CWP, in Dr. Dahhan's opinion. Dr. Dahhan reviewed results of pathological studies from a biopsy of Claimant's lungs, and he opined that the results of the study indicated the presence of nonspecific interstitial fibrosis, but not CWP. Dr. Dahhan opined that Claimant's symptoms were consistent with the symptoms that an individual suffering from interstitial pulmonary fibrosis would experience, and that interstitial pulmonary fibrosis appears in parties regardless of their employment. He also opined that coal miners do not get interstitial pulmonary fibrosis more often than members of the general public, but only if the miner does not have CWP. Dr. Dahhan opined that the fibrosis was severe enough to cause sufficient impairment to prevent Claimant from performing heavy manual labor, and he opined that roof bolting can involve heavy manual labor. Dr. Dahhan attributed Claimant's respiratory impairment to the pulmonary fibrosis, but opined that the fibrosis was not caused by coal mining work. Dr. Dahhan admitted, however, that interstitial fibrosis can be caused by the inhalation of coal mine dust. (E-12).

Dr. John A. Michos

In connection with a medical comment dated July 16, 2001, Dr. Michos, who is board-certified in internal medicine and the subspecialty of pulmonary disease, reviewed specified medical records. Dr. Michos concluded that Claimant has evidence of simple CWP and is unable to perform his last coal mine job. He based his conclusion on: Claimant's "significant" coal mine employment of approximately twenty-five years, most of which was underground; transbronchial lung biopsies, that revealed a mild degree of anthracosis; evidence in prior arterial blood gas studies of a moderate irreversible obstructive defect in the absence of tobacco use; and a lack of other objective evidence to document the etiology to Claimant's pulmonary fibrosis other than his past "significant" coal mine employment. (D-30).

Dr. Emory Robinette

In a series of medical letters dated February 14, 2000, August 22, 2000, August 20, 2001, and February 19, 2002, Dr. Robinette, who is board-certified in internal medicine and the sub-specialty of pulmonary disease and is a certified B-reader, noted that he has been treating Claimant for his pulmonary disease since 1990. He noted that Claimant related a history of working as a coal miner for approximately thirty-three years and performed all of the duties of a general inside miner. Dr. Robinette opined an auscultation of the chest revealed diffuse inspiratory crackles throughout the left hemithorax, a few inspiratory crackles at the right base, wheezes, and prolongation of the expiratory phase. He noted that Claimant's most recent exercise test did not demonstrate oxygen desaturation, but he did not state when this test took place. Dr. Robinette opined that Claimant has evidence of occupational pneumoconiosis, which occurred as a direct consequence of his coal mining employment. He also opined that Claimant has an associated severe restrictive ventilatory defect, which is irreversible and has been progressive over the past ten years, and that x-rays have consistently demonstrated evidence of pneumoconiosis. (C-2).

Conclusions of Law and Discussion

Subsequent Claim

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. For the purpose of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201. In order to obtain federal black lung benefits, a claimant must prove by a preponderance of the evidence that: "(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause to his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 B.L.R. 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 B.L.R. 2-304 (4th Cir. 1995); 20 C.F.R. §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

Material Change in Conditions

Since the instant claim was filed more than one year after the denial of Claimant's previous claim, it is considered a duplicate or subsequent claim under the Act. §725.309. Under the pre-amended regulations, which apply to this case pursuant to §725.2(c), a subsequent claim shall be denied on the grounds of the prior denial unless the claimant demonstrates that there has been a material change in conditions. §725.309(d) (pre-amended). This tribunal must assess *de novo* whether Claimant has established a material change in conditions. To prove a material change in conditions, a claimant must prove at least one of the elements previously adjudicated against him, based on newly submitted probative medical evidence of his condition not available at the time of the prior claim. *Lisa Lee Mines v. Director, OWCP,* [Rutter], 86 F.3d 1358, 20 B.L.R. 2-227 (4th Cir. 1996) (*en banc)*. In the instant claim, the previous denial was based on the finding that Claimant did not establish that he was totally disabled by a pulmonary or respiratory impairment (D-32-121). Therefore, in order to establish a material change in conditions, Claimant must establish that he is totally disabled by a pulmonary or respiratory impairment.

All evidence produced after the previous denial has been considered in concluding in this claim, including x-rays. However, because x-ray evidence is not used directly to determine whether Claimant has a disability caused by pneumoconiosis under §718.204(b)(2), the x-ray evidence in this claim, though considered, is not separately analyzed for change in conditions because of its limited probative value.

Total Disability

To establish total disability, Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. Section 718.204(b)(2) provides the criteria for determining whether a miner is totally disabled. These criteria are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinions of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlehem Mines. Corp.*, 9 B.L.R. 1-95 (1986).

Under §718.204(b)(2)(i), both pre-and post-bronchodilator pulmonary function studies must be weighed when reviewing relevant evidence. *See Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). The fact-finder must determine the reliability of a study based upon its conformity to the applicable quality standards, and must consider the medical opinions of record regarding reliability of a particular study. *Robinette v. Director, OWCP*, 9 B.L.R. 1-154 (1986); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). The record indicates that the Claimant underwent three pulmonary function studies in connection with the pending claim. The studies performed on January 19, 2001

and June 7, 2001 conformed to the standards for pulmonary function studies required under §718.103, while the December 26, 2001 study did not. Aside from one negative result in the post-bronchodilator study in the January 19, 2001 test, all of the studies had qualifying results, both pre- and post-bronchodilator. The June 7, 2001 study was performed with "poor" cooperation, and the December 26, 2001 test was nonconforming for lack of noting cooperation and understanding; therefore they are not considered as persuasive as the January 19, 2001 test, which was performed with good cooperation and understanding. However, because two of the tests had qualifying results, and one had a qualifying result before the bronchodilator was administered, and no pulmonary function studies were submitted that contradict the finding of a disability, the preponderance of the pulmonary function study evidence establishes total disability pursuant to §718.204(b)(2)(i).

Under §718.204(b)(2)(ii), arterial blood gas studies conducted before and after exercise, must be weighed when reviewing relevant evidence. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1982). Four blood gas studies were performed from 2000 to 2001. The February 16, 2000 study only showed resting results, but the remaining tests produced resting and exercise results. The studies performed on January 19, 2001, and June 7, 2001 conformed to the standards for arterial blood gas studies required under §718.105, while the February 16, 2000 and December 26, 2001 studies did not. Of these four studies, the January 19, 2001 study produced qualifying results, the December 26, 2001 study produced a qualifying result after the exercise, and the other two did not have any qualifying results. (D-11, 26, 29, C-1). The June 7, 2001 study was considered not acceptable by Dr. Dahhan, who administered the test, and by Dr. Michos, because Claimant made less than an optimal effort during the examination, and so is not considered persuasive. The studies performed on February 16, 2000 and December 26, 2001 were nonconforming because no altitude or barometric pressure were recorded. Because the January 19, 2001 study, which produced qualifying results, is the only test that conforms to the Act and was performed with optimal effort, it is given the most weight. Because the only conforming test produced positive results, another had qualifying results after the exercise was administered, and Dr. Dahhan stated that his own test was unacceptable, the preponderance of the arterial blood gas study evidence establishes that Claimant was disabled pursuant to §718.204(b)(2)(ii). Since there is no evidence of cor pulmonale with right-sided congestive heart failure, Claimant has not proved total disability pursuant to §718.204(b)(2)(iii).

Of the four physicians used as experts, three opined that Claimant was totally disabled by a pulmonary or respiratory disease and one did not opine on Claimant's disability. Dr. Rasmussen opined that Claimant was totally impaired by a pulmonary disease, because Claimant did not have the pulmonary capacity to perform his last regular coal mine job with its attendant requirement for heavy manual labor. His opinion is reasoned and supported by the medical evidence of record. Dr. Dahhan's opinion was confusing because he stated that Claimant had a mild impairment and did not have the physiological capacity to perform his last job, but had the respiratory capacity to perform his last job in his medical opinion. Dr. Dahhan also opined that Claimant's pulmonary fibrosis was severe enough to totally impair Claimant from his previous job as a roof bolter, which can involve heavy manual labor. It is unclear what Dr. Dahhan is trying to establish, and his opinion is equivocal. Dr. Dahhan did not find the existence of pneumoconiosis, contrary to the opinions of all the other physicians, and he declined to assess a cause for the idiopathic pulmonary fibrosis. However, it does

appear that he concluded that Claimant was totally impaired by a pulmonary disease. Dr. Michos opined that Claimant would not be able to perform his last job as a coal miner based on his pulmonary fibrosis. Dr. Robinette does not comment on Claimant's ability to perform his last coal mining job. All of these physicians are board-certified in internal medicine and the sub-specialty of pulmonary disease, with the exception of Dr. Rasmussen, and their opinions, except Dr. Robinette's, which is not contradictory, are similar in regard to Claimant's disability. No evidence was submitted to controvert a finding that Claimant was totally disabled by a pulmonary or respiratory disease, and all the evidence supports a finding that Claimant was totally disabled by a respiratory or pulmonary impairment. The medical opinions submitted by Claimant establish by a preponderance of the evidence that the Claimant is totally disabled by a respiratory or pulmonary impairment as required under §718.204(b)(2)(iv).

Review of All Evidence

Because the preponderance of the pulmonary function studies, arterial blood gas studies, and the reasoned medical opinions establish that the Claimant is totally disabled, and because the reasoned medical opinions indicate by a preponderance of the evidence that the Claimant's respiratory or pulmonary impairment is totally disabling, this tribunal finds that the Claimant has established that he is totally disabled by a respiratory or pulmonary impairment under §718.204(b), and therefore, has established a material change in conditions.[15] Where a material change in conditions is established, the subsequent claim is then considered a new and viable claim, and is to be reviewed *de novo*. *See Spese v. Peabody Coal Co.*, 11 B.L.R. 1-174 (1988), *dismissed with prejudice*, No. 88-3309 (7th Cir. Feb. 6, 1989)(unpub.). Therefore, Claimant must prove all four elements to receive benefits: (1) the existence of pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause to his total respiratory disability.

Existence of Pneumoconiosis

For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis. See §718.201. Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§718.304, 718.305, and 718.306; or (4) the finding by a physician of pneumoconiosis as defined in §718.201 which is based upon objective evidence and a reasoned medical opinion. Since there is no evidence that Claimant suffers from complicated pneumoconiosis, the presumption set forth in §718.304 is inapplicable. Since the claim was filed after January 1, 1982, and since this is not a survivor's claim, the presumptions set forth in §§718.305 and 718.306 are inapplicable as well.

[15] Judge Kaplan's finding that Claimant had not established that he was totally disabled by a pulmonary impairment on February 5, 1997, had withstood subsequent requests for modification.

The existence of pneumoconiosis requires consideration of "all relevant evidence" under §718.202(a), as specified in the Act. Thus, if a record contains relevant x-ray interpretations, biopsy reports, and physicians' opinions, the Act would prohibit a determination based on x-ray alone, or without evaluation of physicians's opinions that the miner suffered from "legal," as opposed to traditionally clinical, pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 21 B.L.R. 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000).

The record contains evidence of one biopsy by Dr. Scott dated October 3, 1989. Dr. Scott[16], who is board-certified in internal medicine and the subspecialty of pulmonary disease, opined that Claimant had interstitial lung disease, and R/o sarcoidosis, but the results of the biopsy were atypical for CWP. He opined that idiopathic pulmonary fibrosis was a possibility. However, he never ruled out pneumoconiosis and had noted that it was possible that Claimant has CWP in earlier reports. Dr. Shah[17], who is board-certified in anatomic and clinical pathology, examined the biopsy samples on October 4, 1989 and opined that one fragment showed the presence of mild anthracosis with some fibrosis, but no evidence of any distinct alveoli with suggestion of interstitial lung disease present. However, in a follow-up letter dated September 16, 1991, he noted that only a "mild degree of anthracotic pigment" was noted in the particular fragment. (32-48, -51). Diagnoses of pulmonary anthracosis have been held to be the equivalent of a diagnosis of pneumoconiosis. *Dagnan v. Black Diamond Coal Mining Co.*, 994 1536 (11th Cir. 1993)(diagnosis of anthracosis is sufficient to establish pneumoconiosis); *Bueno v. Director, OWCP,* 7 B.L.R. 1-337 (1984); *Smith v. Island Creek Coal Co.*, 2 B.L.R. 1-1178 (1980). However, the Act states that a "finding in an autopsy or biopsy of anthracotic pigmentation...shall not be sufficient, by itself, to establish the existence of pneumoconiosis." §718.202(a)(2). Because Dr. Scott did not definitely find CWP, and because Dr. Shah's opinions are conflicting, the biopsy does not definitively establish that Claimant has pneumoconiosis and the existence of pneumoconiosis is not established under §718.202(a)(2).

The record contains sixty-six interpretations of seventeen chest x-rays. One was classified as P/R film quality, one was unreadable, and three were of three film quality. Seventeen of the readings were positive for pneumoconiosis. Forty-three of the negative readings and eleven positive readings were made by board-certified radiologists and B-readers. Six of the positive readings and one negative were done by B-readers only. This tribunal bases its decisions on the quality of the evidence, not the quantity, but the quality being substantially equal in this case, the amount of negative readings compared to the positive readings causes this tribunal to give them more weight. The preponderance of the doctors did not conclude that the x-ray readings demonstrated pneumoconiosis, and this tribunal finds that the radiographic evidence alone does not establish that the Claimant has pneumoconiosis under §718.202(a)(1).

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[16] This tribunal has taken judicial notice of medical qualifications by reference to the worldwide web.

[17] This tribunal has taken judicial notice of medical qualifications by reference to the worldwide web.

In his decision and order in 1997, Judge Kaplan found that Claimant had established pneumoconiosis by well reasoned medical opinions. After reviewing the previously submitted medical opinions, this tribunal finds that Claimant had established pneumoconiosis and agrees with Judge Kaplan's decision and order. A review of the medical opinions submitted with the duplicate claim also establish that Claimant had pneumoconiosis. In a well reasoned opinion that was supported by the medical evidence, Dr. Rasmussen opined that Claimant suffered from pneumoconiosis based upon a review of a positive x-ray reading and an examination of the Claimant. Drs. Robinette and Michos also opined that Claimant had pneumoconiosis. Dr. Dahhan opined in a deposition and medical opinion that Claimant had interstitial pulmonary fibrosis, not CWP. While Dr. Dahhan opined that Claimant's pulmonary fibrosis can occur in parties that do not work in coal mines, he did not provide any explanation as to the cause of Claimant's pulmonary fibrosis, and did state that the disease can be caused by coal mining. Dr. Dahhan has somewhat better credentials than Dr. Rasmussen, but because Dr. Rasmussen's opinion is well reasoned and well documented, and he has expertise in the field of pulmonary disease, his opinion is given more weight as that of Dr. Dahhan's, which is confusing and equivocal. The opinions of Dr. Rasmussen, Michos, and Robinette that Claimant has pneumoconiosis, and Dr. Dahhan's not necessarily inconsistent finding that Claimant has pulmonary fibrosis, establishes by a preponderance of the evidence that Claimant has pneumoconiosis under §718.202(a)(4).

Causation

In addition to establishing the existence of pneumoconiosis, a claimant must also establish that his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, Claimant established at least twenty-four years of coal mine employment, as stipulated by Employer. In his 1997 decision and order, Judge Kaplan found that Employer had not rebutted the presumption that Claimant's pneumoconiosis arose from his coal mine employment. A review of the evidence previously submitted established that Employer had not rebutted the presumption and Judge Kaplan made the correct ruling. In the evidence submitted with the duplicate claim, Dr. Dahhan indicated that Claimant's pneumoconiosis did not arise from coal mining. However, while Drs. Rasmussen, Robinette, and Michos all attribute Claimant's pneumoconiosis to coal mining, based on Claimant's coal mining history and lack of other possible causes, Dr. Dahhan made no attempt to explain the cause of Claimant's pulmonary fibrosis, and only stated without reason or evidentiary support that it was not caused by coal mining. In addition, Dr. Dahhan conceded that interstitial pulmonary fibrosis can be caused by coal mining. Because Dr. Dahhan did not give a cause to Claimant's pulmonary fibrosis, and did not persuasively rule out coal mine dust exposure as a cause, and because Drs. Rasmussen, Robinette, and Michos all attribute pneumoconiosis to coal mining, Claimant is entitled to the presumption, and is deemed to have established, that his pneumoconiosis arose from his coal mine employment under the provisions of §718.203(b).

Total Disability

Claimant has established that he is totally disabled due to a pulmonary or respiratory impairment under the evidence submitted with the duplicate claim. Pneumoconiosis is recognized as a latent and progressive disease by the Act. §718.201(c). While the evidence that had been submitted prior to the duplicate claim has been reviewed, it is given less weight in determining whether Claimant is totally disabled because of the progressive nature of pneumoconiosis than the evidence submitted with the duplicate claim. The purpose of reviewing the evidence is to determine if Claimant is totally disabled now, and there is nothing in the past evidence that would prevent this tribunal from making that finding. Therefore, Claimant has established that he is totally disabled by a preponderance of the evidence under §718.204(b)(2)(iv) as discussed above.

Total Disability Due to Pneumoconiosis

To establish entitlement, a claimant must prove by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. Pursuant to §718.204(c)(1), a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 B.L.R. 2-68, 2-76 (4th Cir. 1990); *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37, 1-41, 1-42 (1990). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 B.L.R. 2-1 (4th Cir. 1994).

In a well reasoned and well documented report, Dr. Rasmussen opined that Claimant was totally disabled and concluded that Claimant was permanently disabled by coal mine dust, and possibly asbestos from the coal mines. Dr. Rasmussen based his opinion on Claimant's coal mining history, his review of x-ray readings, his examination of Claimant, and the absence of other etiology. The evidence of record establishes that Claimant has no significant smoking history. Dr. Michos also opined that pneumoconiosis caused Claimant's total disability, and Dr. Robinette has stated in past medical opinions that Claimant is totally disabled by CWP. Dr. Dahhan's opinion is equivocal and unclear in regard to the cause of the total disability of Claimant because he only stated that Claimant was totally disabled by interstitial pulmonary fibrosis, but never gave its etiology, only stating *ex cathedra*, that it was not caused by coal mining. However, he did state that interstitial pulmonary fibrosis could be caused by coal mining. While Dr. Rasmussen does not have the same credentials as Dr. Dahhan, his opinion is better reasoned and is based, with particularity, on the medical evidence, and so Dr. Rasmussen's opinion is given more weight. In addition, Drs. Michos' and Robinette's opinions support Dr. Rasmussen's opinion with similar conclusions. Drs. Rasmussen's and Robinette's reliance on the belief that Claimant had thirty-three years of coal mine history does not weigh significantly against their opinions, because the evidence as a whole reflects such an extensive underground coal mine dust exposure history.[18] In addition, Dr. Dahhan applied the thirty-three year coal mine history in his examination notes as well, which demonstrates a consistency in the

[18] Apparently, the doctors relied on Claimant's claim that he worked in the coal mines for thirty-three years, which is more than what was stipulated, but is not disproved by the record. (D-1, 2, Tr. 17-19)

examination of Claimant by Drs. Rasmussen, Robinette, and Dahhan. Dr. Michos relied on a twenty-five year coal mine history, and came to the same conclusions as Dr. Rasmussen and Robinette, which suggests that their reliance on the thirty-three year coal mine history does not substantially impair the reliability of their opinions. Claimant has submitted convincing evidence that he is totally disabled due to pneumoconiosis and Employer has not effectively contradicted that evidence. Therefore, Claimant has established by a preponderance of the evidence that he is totally disabled due to pneumoconiosis under §718.204(c)(1).

Conclusion

Since Claimant has demonstrated a material change in conditions by a preponderance of the evidence, and since he has established by a preponderance of the evidence all of the elements of entitlement, his claim for benefits should be granted.

Date of Onset or Entitlement

Section 725.503(b) of the act provides that benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claim was filed, and "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." §§725.309(d)(5), 725.503(b) Dr. Rasmussen first opined that Claimant was disabled on January 19, 2001, in a well reasoned medical report based on the medical evidence. Dr. Rasmussen's opinion is supported by Dr. Michos' finding that Claimant was totally disabled by pneumoconiosis, is not contrary to Dr. Robinette's opinion, and Dr. Dahhan's opinion is not considered pertinent to this finding, because he did not find Claimant totally disabled by pneumoconiosis. While Dr. Robinette had a medical record with an earlier date, he did not opine that Claimant was totally disabled by pneumoconiosis at that time. Dr. Robinette's opinions before the prior denial are not considered because Claimant cannot receive benefits predating the prior denial and Claimant was not found to be totally disabled by a pulmonary or respiratory disease in the previous denial of benefits.. Therefore, January 19, 2001, is determined to be the date of onset, and entitlement to benefits to have commenced as of January, 2001.

Attorney's Fee

Claimant's counsel may file an application for approval of an attorney's fee with this tribunal within thirty days of the date of this decision in accordance with §§725.365 and 725.366. A service sheet must accompany any fee application, showing that service of the application has been made upon all parties including the Claimant. Objections to the application may be filed within ten days following receipt of such a fee application. The Act prohibits charging any fee to the Claimant for representation in relation to prosecution of a black lung claim in the absence of

prior approval in accordance with the applicable regulations.

ORDER

The claim of Billy Owens for benefits under the Act is granted. Payment of benefits by Employer shall commence as of January 1, 2001, as prescribed by the Director, Office of Workers' Compensation..

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EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.